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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 251

JAMES STEWART & CO., INC.,

Appellant,

vs.

KATHERINE SADRAKULA, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS WHICH WERE OF NICHOLAS SADRAKULA, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

CLARENCE E. MELLEN,
FREDERICK MELLOR,
Counsel for Appellant.

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STATEMENT AS TO JURISDICTION ON APPEAL.

May it Please the Court:

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1; 43 Stat. 936, 937 (U. S. Code, Title 28, Section 344), provides that Section 237 of the Judicial Code is amended to read in part as follows:

"(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit

could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, * * *, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Act of January 31, 1928, Chapter 14; 45 Stat. 54, as amended by Act of April 26, 1928, Chapter 440; 45 Stat. 466 (28 U. S. C. A. Sections 861-A and 861-B), provides:

"That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"Section 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

Date of Judgment and Date of Application for Appeal.

The judgment of the Supreme Court of New York sought to be reviewed was entered on the 13th day of April, 1939, and the application for appeal is presented this 22nd day of June, 1939.

C.

Statute of the State of New York, the Validity of Which is Involved.

The statute, the validity of which is involved, is Section 241, subdivision 4 of an act, known as the Labor Law, which

constitutes Chapter 31 of the Consolidated Laws of New York (Laws of 1921, Chapter 50, Section 241, as amended by Laws of 1922, Chapter 1, and Laws of 1930, Chapter 603; McKinney's Consolidated Laws of New York, Book 30, Section 241).

Said statute, as it was in effect on and after April 19, 1930, read:

"SEC. 241. PROTECTION OF EMPLOYEES ON BUILDING CONSTRUCTION OR DEMOLITION WORK, INCLUDING EXCAVATION WORK IN CONNECTION THEREWITH. All contractors and owners, when constructing or demolishing buildings shall comply with the following requirements:

1. If the floors are to be arched between the beams thereof, or if the floors or filling in between the floors are of fireproof material, the flooring or filling in shall be completed as the building progresses.

2. If the floors are not to be filled in between the beams with brick or other fireproof material, the underflooring shall be laid on each story as the building progresses.

3. If double floors are not to be used, the floor two stories immediately below the story where the work is being performed shall be kept planked over.

4. If the floor beams are of iron or steel, the entire tier of iron or steel beams on which the structural iron or steel work is being erected shall be thoroughly planked over to not less than six feet beyond such beams, except spaces seasonably required for proper construction of the iron or steel work, for raising or lowering of material or for stairways and elevator shafts designated by the plans and specifications.

5. If elevators, elevating machines or hod-hoisting apparatus are used in the course of construction, for the purpose of lifting materials, the shafts or openings in each floor shall be inclosed or fenced in on all sides by a barrier of suitable height, except on two sides which may be used for taking off and putting on materials, and those sides shall be guarded by an adjustable barrier not less than three nor more than four feet from

the floor and not less than two feet from the edges of such shafts or openings.

6. If a building in course of construction is five stories or more high, no lumber or timber for such construction shall be hoisted or lifted on the outside of such building."

D.

Nature of Case.

(Herein the appellant will be referred to as "defendant" and appellee's intestate as "plaintiff".)

This is a civil action wherein appellee sued defendant, under the New York equivalent of Lord Campbell's Act (Consolidated Laws of New York, Chapter 13, Section 130) to recover damages for the death of plaintiff.

The accident occurred on October 24, 1935, in the Post Office and Federal Office Building in New York City which defendant, as general contractor, was erecting pursuant to a contract with the Treasury Department of the United States, Procurement Division (R.[1] 5, 18, 110, Defendant's Exhibit A for Identification, R. 121; excluded, R. 111), on land which the United States had purchased for that purpose in 1931, with the consent of the New York Legislature (R. 17, 18).

Plaintiff was employed as foreman rigger by United Hoisting Co. and was in charge of installing certain concrete mixing and conveying equipment, including a bucket hoist, which his employer had contracted to furnish and install for defendant's use during the construction of the building (R. 5, 24, 25; Plaintiff's Exhibit 3, R. 118, admitted, R. 34).

The installation thereof was begun the day before the accident (R. 27). At that time, the erection of the structural steel for that section of the building had been completed

[1] All references are to pages of the printed Case on Appeal in the Court of Appeals, which will be included in the certified record prepared by the Clerk of the Supreme Court of the State of New York, Kings County, and filed with the Clerk of this Court.

(R. 113, 114) but no floors had been "filled in", except at the first tier of steel (the one from which plaintiff fell). There, the floor "forms" had been placed and concrete poured in all but the two adjacent "bays", in which the hoisting equipment was to be placed (R. 43, 61, 67). Admittedly, those "bays" were not "planked over" but the hoist could only be installed in "open steel" (R. 39).

While standing on a plank which was lying across one of those "bays", to measure one of the two vertical "guide-rails" which he had erected to carry the bucket-hoist, plaintiff fell to the ground beneath, receiving the injuries from which he died (R. 61, 62, 65, 79, 85).

The shaftway for the hoist occupied only a small part of the "bay" and its location therein, which depended upon the precise position of other parts of the equipment, had been determined by plaintiff, as a part of his work (R. 38, 40, 45, 46).

Appellee charged defendant with liability for plaintiff's death solely upon the ground that the New York Labor Law, Section 241 (4), required it to keep the beams, at the place where plaintiff fell, "thoroughly planked over" and that his death was caused by defendant's failure to do so (R. 112, folio 336). All other specifications of negligence were expressly withdrawn (R. 96, 97, 98, 110, 112).

In support of its defense that the Labor Law did not apply to the construction of that building, defendant offered in evidence (R. 110, 111) its contract with the United States, dated November 9, 1934, particularly the stipulations therein relative to the applicability of State and municipal building regulations to the work therein provided for (Defendant's Exhibit A for Identification, R. 121). It was there provided that municipal ordinances "do not apply inside of the lot lines" and that "State or Municipal Building Regulations do not apply to work inside the Government's lot lines" (R. 121, folios 362, 363). This was ex-

cluded on appellee's objection that it was "not binding in this matter" to which ruling defendant duly excepted (R. 110, 111).

At the conclusion of the evidence, defendant moved for the direction of a verdict in its favor "on the specific ground" that the Labor Law "is not applicable to the place of the accident and that application thereof to the place of the accident is in violation of Article 1, Section 8 of the United States Constitution" and duly excepted to the denial thereof (R. 112, 113, folios 336-337). The jury was then waived by consent of the parties and the case was submitted to the Court for decision (R. 113). The Court found, as a fact, that "the proximate cause of the accident which occasioned decedent's death was the failure of the defendant to thoroughly plank over the beams as required by Section 241, subdivision 4, of the Labor Law" and directed judgment in favor of the appellee (Memorandum Decision of Hon. Harry E. Lewis, Justice, appended hereto; R. 122), upon which judgment was duly entered in the office of the Clerk of the Supreme Court, Kings County, on November 24, 1937 (R. 15).

Defendant duly appealed to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from that judgment and, upon that appeal, in its brief and argument (no assignment of errors being provided for in New York practice) contended that, as applied and enforced in this case, the New York Labor Law, Section 241, subdivision 4, was repugnant to Article 1, Section 8 of the Constitution of the United States and to the Provisions of U. S. Code, Title 40, Sections 285, 341 and 342 (30 Stat. 614; 44 Stat. 630, 631) and that the denial of its motion for the direction of a verdict in its favor was, therefore, reversible error. Nevertheless, said Appellate Division unanimously sustained the validity of that application of said statute and affirmed said judgment (R. 127, 128.

129), holding that the statute, having been in effect "before the act of cession" and there having been "no action by Congress displacing * * * (it) in respect of this Federal reservation", it continued to apply therein (R. 131; Memorandum Decision of Appellate Division, Second Department, appended hereto; R. 131; officially reported, Sadrakula, as admx., etc. *v.* James Stewart & Co., Inc., 254 N. Y. App. Div. 892).

Defendant then applied to the Court of Appeals, under New York Civil Practice Act, Section 588 (5), for permission to appeal from said judgment of affirmance and, also, appealed to said court, as of right, under New York Civil Practice Act, Section 588 (1), upon the ground that said judgment was "entered upon" a decision "which finally determines an action * * * wherein is directly involved the construction of the Constitution * * * of the United States, * * *." The Court of Appeals denied defendant's motion for *permission* to appeal "on the ground that an appeal has been properly[2] taken *as of right*" (R. 130; officially reported, 279 N. Y. 686).

In its brief and upon the argument of that appeal in the Court of Appeals, defendant claimed that said Labor Law, when applied to the place where plaintiff sustained his injury, was invalid, in that it was repugnant to Article 1, Section 8 of the Constitution of the United States and contrary to the express stipulations of defendant's contract with the United States (Defendants Exhibit A for Identification, R. 121; excluded, R. 111), made pursuant to United States Code, Title 40, Sections 285, 341, 342 (30 Stat. 614; 44 Stat. 630, 631). The Court of Appeals unanimously, without opinion, affirmed the said judgment against defendant and decided in favor of the validity of said Labor Law when so applied. (Officially reported, *Sadrakula, as admx. etc.*, v. *James Stewart & Co., Inc.*, 280 N. Y. (Adv. #1) 157 Mem.)

[2] All emphasis contained in quotations herein is ours.

On defendant's application, the Court of Appeals thereafter amended its Remittitur by adding thereto the following (Officially reported, *Sadrakula* v. *Stewart*, 280 N. Y. (Adv. #2) 236 Mem.):

> "A question under the Federal Constitution was presented and necessarily passed upon by this Court. The appellant contended that Section 241, sub-division 4 of the Labor Law of the State of New York (Consolidated Laws of New York, Chapter 31, Section 241, sub-division 4) insofar as the said law is construed to apply to the construction and erection of a post office building pursuant to a contract with the Treasury Department of the United States, upon land within the exterior boundaries of the State of New York but which is within the exclusive jurisdiction of the United States under Article 1, Section 8, Clause 17 of the Constitution of the United States, is repugnant to the Constitution and laws of the United States in that it offends Article 1, Section 8 of the Constitution of the United States and Title 40 U. S. Code, Sections 285, 341 and 342 (30 U. S. Stat. 614; 44 U. S. Stat. 630, 631) and is invalid when so applied.
>
> This Court held that the aforesaid Labor Law of the State of New York is valid and not repugnant to any provision of the Constitution of the United States."

No opinions were written in any of the State courts, except the memorandum decisions of the Supreme Court, Kings County (Hon. Harry E. Lewis, Justice), and of the Appellate Division, Second Department, both of which are appended hereto (pp. 16-17, post).

E.

State of proceedings at which, and manner in which, the Federal questions sought to be reviewed, were raised in the Court of First Instance and in the Appellate Courts and the way in which they were passed upon in those courts.

The Federal questions sought to be reviewed were raised in the court of first instance by defendant's motion to dis-

miss the complaint, at the close of plaintiff's case (R. 98, 99, folios 294, 295, 297) which was renewed at the close of the entire case (R. 112, folios 334, 335); and by its motion for the direction of a verdict in its favor (R. 112, 113, folios 336, 337). Those motions were denied by that Court, to which rulings defendant (appellant) duly excepted (R. 99, folio 297; R. 112, folio 335; R. 113, folio 337).

In the Appellate courts they were raised by appellant's appeal from the final judgment against it, and urged in the briefs and oral arguments. The Appellate Division, Second Department, passed upon those questions in its Memorandum Decision (R. 131; Officially reported, *Sadrakula, etc.* v. *James Stewart & Co., Inc.*, 254 N. Y. App. Div. 892) and affirmed the judgment of the Supreme Court, Kings County (R. 127, 128) and the Court of Appeals affirmed the said judgment of affirmance of said Appellate Division, Second Department (Officially reported, *Sadrakula, etc.* v. *James Stewart & Co., Inc.*, 280 N. Y. (Adv. #1) 157 mem.).

That those questions had been properly raised and necessarily decided was determined by the Court of Appeals upon its denial of appellant's motion for leave to appeal to that court, under New York Civil Practice Act, Section 588 (5). Said court then held that appellant's appeal, *as of right*, under Civil Practice Act, Section 588 (1), was properly taken. Under that statute, an appeal to the Court of Appeals from a judgment of affirmance by the Appellate Division, entered upon a *unanimous* decision, is allowed, as of right, *only* when such judgment is entered upon a decision, finally determining an action, "wherein is *directly* involved the construction of the constitution of the state or of the United States * * *."

F.

Grounds Upon Which it is Contended that the Questions Involved Are Substantial.

The precise question presented in the instant case is whether the State Labor Law which was in effect when jurisdiction of the enclave was ceded to the United States, continued in effect thereafter, so as to render it applicable to a post office, under construction therein for the United States, pursuant to a contract in which the sovereign specified that "State or Municipal Building Regulations do not apply to work inside the Government's lot lines" (Defendant's Exhibit A for Identification, R. 121; excluded, R. 110, 111).

The decisions of the State courts do not rest upon the ground that exclusive jurisdiction of the enclave had not, in fact, been ceded before the accident and before the execution of appellant's contract with the United States, but are placed entirely upon the ground that the State statute continued to apply *after* such cession, because the Congress had not "displaced" it (Decision of Appellate Division, appended hereto; R. 131; Officially reported, *Sadrakula, as admx. etc.*, v. *James Stewart & Co., Inc.*, 254 N. Y. App. Div. 892).

That laws, termed "municipal", which regulate the rights of the inhabitants of such enclave in their relations with one another, continue in force after such cession, on the theory that they have been *adopted* by the new sovereign, has been decided by this Court.

Chicago, Rock Island & Pacific R. R. Co. v. *McGlinn*, 114 U. S. 542, 546;

Barrett v. *Palmer*, 162 U. S. 399;

Hamburg-American Steamship Co. v. *Grube*, 196 U. S. 407;

Western Union Telegraph Co. v. *Chiles*, 214 U. S. 274;

Vilas v. *City of Manila*, 220 U. S. 345;
Arlington Hotel Co. v. *Fant*, 278 U, S. 439.

The statute involved herein is not a law of that character. It regulates the manner and order in which certain parts of the work must be done in the construction of buildings and renders failure to comply with those requirements a criminal offense (Penal Law, Sec. 1275; Consolidated Laws of New York, Chapter 40, Sec. 1275). In New York City its enforcement is entrusted to the Superintendent of Buildings of that city, who is also charged with the enforcement of the Building Code of the City of New York. That official is authorized to enter upon any premises wherein such work is being performed and is empowered, if he deems it necessary, to order the cessation of all work pending compliance with its requirement. Labor Law, Sec. 242; Baldwin's Code of Ordinances of the City of New York, Chap. 5; Secs. 10 and 190; *People Ex rel. Levering* v. *Leo*, 112 N. Y. Misc. R. 325.

As applied in the instant case, that statute operated to impose a burden upon the work which appellant was performing for the United States.

The establishment and conduct of the post office system and the construction of buildings therefor is an exclusive function of the Federal Government. Constitution of the United States, Art. 1, Sec. 8, Clause 7. The construction of the building in the instant case was therefore an exclusive function of the Federal Government, and the State and its officers were powerless to compel compliance with that State statute, not merely because it was beyond their territorial jurisdiction, but because enforcement thereof would constitute an interference with the exercise by the Federal Government of its functions.

Arizona v. *California*, 283 U. S. 423, 451;
McCulloch v. *Maryland*, 4 Wheat. 316, 436;

Oklahoma City v. *Sanders* (C. C. A.), 94 F. (2d) 323;

United States National Bank v. *Pamp* (C. C. A.), 77 F. (2d) 9, 12.

The argument that imposition of civil liability upon appellant did not interfere with the performance of this Federal function begs the question. *Compliance* with the requirements of the statute imposed a direct burden thereon and civil liability results solely from non-compliance.

That the United States could adopt those requirements as its own may not be questioned. It is, however, equally clear that *it alone* had the right to determine the advisability of doing so. The ultimate question then is: Did it intend to do so?

Its only expression on that subject is found in its contract with appellant wherein it is expressly provided that "State or Municipal Building Regulations do not apply to work inside the Government's lot lines" (Defendant's Exhibit A for Identification, R. 121; excluded, R. 111).

The decision of the State courts in the instant case presents the incongruous situation that a state statute is effective to impose civil liability for non-compliance with its terms but ineffective to compel compliance therewith. (Cf. *Murray* v. *Joe Gerrick & Co.*, 291 U. S. 315, 319).

The question here presented has never been determined by this Court. In fact, we know of no case in which the applicability of a statute of this character to work being done for the Federal Government, in territory within its exclusive jurisdiction, has been considered, except *Oklahoma City* v. *Sanders*, *supra* (94 F. (2d) 323). In that case, however, the question of civil liability for non-compliance was not presented.

Whether Act of February 1, 1928, 45 Stat. 54 (16 U. S. C. A. Sec. 457), renders the State Labor Law applicable in

the instant case, is also involved. That statute reads in part:

> "*Action for death or personal injury within national park or other place under jurisdiction of United States; application of state law.** In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any state, such right of action shall exist as though the place were under the jurisdiction of the state within whose exterior boundaries such place may be; * * *." (* Italicized in original.)

The only case in which the construction of that Act has been before this Court is, *Murray* v. *Joe Gerrick & Co., supra* (291 U. S. 315), in which it was held that the Washington Workmen's Compensation Act was not thereby rendered effective in Federal territory. True, that State law was enacted *after* the cession of jurisdiction to the United States. However, no distinction is made by the statute itself upon that ground. The decision in that case seems to have been based principally upon the ground that the remedy granted by the State statute and which it was sought to enforce therein was not a "right of action", within the meaning thereof. It was said that the purpose of that Act was to prevent the abatement of causes action for injuries resulting in death, accruing in Federal territory. That this was, in fact, its purpose was stated by its sponsor, the late Senator Walsh of Montana, in explaining it in the Senate (Congressional Record, Vol. 69, Part 2, pp. 678, 1293, 1486).

Since the enactment of Act of February 1, 1928, 45 Stat. 54 (16 U. S. C. A., Sec. 457), several bills have been introduced in Congress which were intended to require compliance with State safety laws on Federal projects, but all failed of enactment. The latest of which we are aware was introduced in the first session of the 75th Congress by

Senator Sheppard (S. 1744; Congressional Record, Vol. 81, No. 42, p. 2159). It read:

> "Be it enacted," etc., "That all agencies of the Federal Government undertaking construction of public buildings and other public works under Federal law shall observe, and shall require all employees and contractors to observe the various State safety laws, as well as safety laws and regulations of the Federal Government."

It would seem therefore that Congress not only did not construe the Act of February 1, 1928, as adopting such State laws for the regulation of Federal projects, but that it was unwilling to do so.

It is appellant's contention that the Federal questions presented in the instant case are substantial for the reason that they have never been directly decided by this Court; that a final and definite determination thereof is of the greatest importance, not only to appellant, but to all others contracting with the United States for similar work, and that the decision of the State courts in the instant case is contrary to the intent of the United States as expressed in its contract with appellant.

There is appended hereto copies of the opinions of the Supreme Court of the State of New York, Kings County, and of the Appellate Division of the Supreme Court, Second Judicial Department, delivered in rendering their respective judgments herein. No opinion was delivered by the Court of Appeals in rendering the judgment sought to be reviewed.

G.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Hamburg-American Steamship Co. v. *Grube*, 196 U. S. 407, 414;
Dickenson v. *Stiles*, 246 U. S. 631, 632;
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282, 288, 289;
Ward v. *Krinsky*, 259 U. S. 503, 507, 510;
Home Insurance Co. v. *Dick*, 281 U. S. 397, 406, 407;
Near v. *State of Minnesota*, 283 U. S. 697, 709, 722, 723.

Respectfully submitted,

CLARENCE E. MELLEN,
FREDERICK MELLOR,
Attorneys for Appellant.

EXHIBIT "A".

Decision of Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

Supreme Court, Appellate Division, Second Department.

KATHERINE SADRAKULA, as Administratrix, etc., of Nicholas Sadrakula, *Respondent*,

vs.

JAMES STEWART & CO., INC., *Appellant*.

Present: Lazansky, P. J., Hagarty, Carswell, Davis and Taylor, Jr., JJ.

Action for damages for the death of plaintiff's decedent as a consequence of a violation by the defendant of Section 241, subdivision 4, Labor Law, in the course of the erection of a Federal post office building.

Judgment for plaintiff unanimously affirmed, with costs. (a) The evidence adequately established that the proximate cause of the decedent's death was defendant's failure to plank over the steel beams in the western area of the "bay" as required by Section 241, subdivision 4, Labor Law. (b) The Labor Law provision was in effect at the place of the accident because that statute was enacted prior to the acquisition of the property by the Federal Government. The common law and statutes in effect before the act of cession remain in force until displaced by Congress (Kaufman *v.* Hopper, 220 N. Y. 184, 187, 115 N. E. 470, and cases cited therein). There has been no action by Congress displacing the Labor Law in respect of this Federal reservation. Such Federal action as has taken place is confirmatory of plaintiff's right to invoke the applicable State statutes (45 Stat. 54, tit. 16, U. S. Code, sec. 457).

CORRECTED OPINION BY LEWIS, J., DATED NOVEMBER 30, 1937.

Supreme Court, Trial Term—Part VIII.

By Mr. JUSTICE LEWIS.

Sadrakula, as adm'x, &c., *v.* James Stewart & Co., Inc., and ano. (corrected)—Action by the plaintiff against the general contractor, James Stewart & Co., Inc., for damages resulting from the death of her husband, an employee of a subcontractor. The proximate cause of the accident which occasioned decedent's death was the failure of the defendant to thoroughly plank over the beams as required by section 241, subdivision 4, of the Labor Law. The defense of assumption of risk is not maintainable where, as here, the relationship of master and servant did not exist. There was likewise a failure to establish that plaintiff's decedent was guilty of any contributory negligence. I direct judgment in favor of the plaintiff for the sum of $23,125.

LEWIS, *J. S. C.*